

**BEFORE THE ADMINISTRATIVE HEARING COMMISSION
STATE OF MISSOURI**

DOUGLAS M. OMMEN, Director)
Department of Insurance, Financial)
Institutions and Professional Registration,)
State of Missouri,)

Petitioner,)

vs.)

JOSEPH E. WARDEN,)

Respondent.)

FILED

MAY 29 2007

**ADMINISTRATIVE HEARING
COMMISSION**

Case No.: 06-0996 DI

PETITIONER'S REPLY BRIEF

Pursuant to the Commission's Order dated March 12, 2007, the Director of the Missouri Department of Insurance, Financial Institutions and Professional Registration, through counsel, hereby submits the following Reply Brief in support of his complaint and original brief. Despite any contentions and allegations made in Respondent's Brief, the evidence presented in this matter demonstrates that the Director of the Missouri Department of Insurance, Financial Institutions and Professional Registration ("Director") has established cause to discipline Respondent's insurance license pursuant to sections 375.141.1(2), (4), (7), and (8), RSMo (Supp. 2005).

1. On or about May 11, 2007, Joseph E. Warden ("Respondent") filed Respondent's Brief with this Commission.

2. In Respondent's Brief, Respondent contends that he was unaware of "any misuse of CRL's [Capital Reserve Life Insurance Company] funds or any malfeasance until late afternoon of September 2, 2005" and that he had no reason to know of fraud because the fraud

“was concealed from him and he could not have known of the fraud”. *Respondent’s Brief*, pp. 2 and 7. Also in his brief, Respondent admits that the Capital Reserve directors, including Respondent, received financial statements at each directors meeting and “had ongoing access to . . . any financial information that they requested.” *Respondent’s Brief*, p. 6. Thus, even if Respondent was not personally aware of fraudulent activities at Capital Reserve, he had every opportunity to learn about financial matters through financial statements which, he admits, were made available at every directors meeting.

In his brief, Respondent contends that he did not benefit from “inappropriate CRL medical reimbursement checks” that “were deposited in a joint checking account” held by Respondent and his spouse, Linda Warden. *Respondent’s Brief*, pp. 4 and 7. Respondent’s contention constitutes an admission, supported by the evidence in this case, that Respondent inappropriately received funds from Capital Reserve. *AHC Transcript at pp. 8, 19, 25, 28-29, 31-33, 36, 40 - 41 and Exhibits 2, 3, and 5 – 18.*

3. Also in his brief, Respondent admits to writing “occasional checks” out of an account held jointly with his spouse at the “same time she [Linda Warden] was submitting apparently fraudulent medical reimbursement requests to CRL.” *Respondent’s Brief*, pp. 4 and 7. Respondent’s contention that the “minor exception” of writing “occasional checks” from a joint account funded with “inappropriate medical reimbursement checks” does not constitute a financial benefit is absurd. During 2004 and 2005 Respondent personally requested reimbursements and collected reimbursement checks from Capital Reserve. *AHC Transcript at page 19 and Exhibit 3.* During 2004 and 2005 Respondent received multiple reimbursements in response to multiple requests for identical reimbursement items and reimbursements for items that could not be verified as having a reasonable business purpose.

AHC Transcript at pages 40-41, and Exhibit 14-16. Such conduct constitutes a violation of section 375.390, RSMo (2000), and grounds for discipline of Respondent's insurance license pursuant to section 375.141.1(2) and (4), RSMo (Supp. 2005).

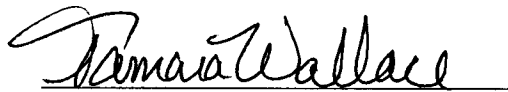
4. In his brief, Respondent suggests that this Commission should decide whether or not Respondent should have known about the fraudulent reimbursement payments at Capital Reserve, suggesting that this Commission should not find cause to discipline his license if he should not have known of fraudulent activity occurring at Capital Reserve. *Respondent's Brief, p. 7.* Directors of a corporation are "vested with the control of its business, and this power entails an obligation to exercise ordinary care, to the end that the assets of the corporation shall not be lost or dissipated . . . The care required of directors 'is that which ordinarily prudent and diligent men would exercise under similar circumstances, and in determining that the restrictions of the statute and the usages of business should be taken into account' (quoted in *Stone v. Rottman*, 183 Mo. loc. cit. 573, 82 S.W. 82)." *Boulicault v. Oriel Glass Co.*, 223 S.W. 423, 426 (Mo. 1920). Corporate directors have a "duty to manage the corporation, and it is negligence for the directors to leave the management of the corporation entirely up to others." *Heit v. Bixby*, 276 F.Supp. 217, 231 (E.D.Mo.1967). In short, directors cannot blindly permit other officers to manage the company. In his brief, Respondent contends that he asked Anthony Hutchinson, Capital Reserve controller, about medical costs when they exceeded budgeted amounts. *Respondent's Brief, pp. 5 – 6.* Respondent's failure to inquire further after the company controller told him that excessive medical costs were the result of "a lot of sick people," does not appear to be the care other "ordinarily prudent and diligent men would exercise under similar circumstances". Petitioner asserts that Respondent owed a duty of care to Capital Reserve and its shareholders as president and chief executive

officer and his failure to adequately inquire into the company's financial affairs constitutes incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere, grounds for disciplining Respondent's insurance license pursuant to section 375.141.1(8), RSMo (Supp. 2005).

5. Respondent's Brief contends that while examining Capital Reserve, Petitioner's Chief Examiner was "overzealous . . . exhibited little competence . . . rushing to judgment of guilt on the part of Respondent without having performed an investigation of relevant facts" resulting in the foreclosure of Respondent's home. *Respondent's Brief*, pp. 6-7. Respondent contends that he "has been unable to secure employment because of inappropriate comments of Department of Insurance Investigator, Dana Whaley." *Respondent's Brief*, p. 7. These contentions are unsubstantiated, without merit, and clearly contrary to the evidence of this case. *AHC Transcript*, pp. 14-15 and Exhibit 2.

WHEREFORE, based on the foregoing and the previously filed Petitioner's Brief, the Director respectfully requests that the Commission make findings of facts and conclusions of law stating that the Director has established cause to discipline the insurance license of Respondent, Joseph E. Warden.

Respectfully submitted,

A handwritten signature in black ink, reading "Tamara Wallace", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and correct copy of the foregoing was mailed first class, with sufficient postage attached, via the United States Postal Service on this 29th day of May, 2007, to:

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